135-550

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 282.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LUKE VOORHEES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JANUARY 4, 1887.

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1 Pleas before the Hon. Elmer S. Dundy, judge of the district court of the United States, for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the term of May, A. D. 1886.

Be it remembered that on the 13th day of July, 1886, amended petition was filed in the office of the clerk of said circuit court, which said amended petition is in words and figures following, to wit:

In the United States circuit court, district of Nebraska.

THE UNITED STATES, PL'FF,
vs.
LUKE VOORHEES, DEF'T. } Amended petition.

The United States of America, plaintiff, complains of Luke Voorhees, defendant, and for cause of action says:

That on the day of , A. D. 1878, the said defendant entered into a certain contract in writing with the Postmaster-General, of which contract a copy is hereto annexed, marked "Exhibit A," and made a part hereof, whereby said defendant agreed for and in consideration of the sum therein named to transport the mails of the United States from Fargo to Pembina, in the Territory of Dakota, and back, over the route known as route number 35040, six times a week.

That on the 30th day of July, 1878, an order was made by the Postmaster-General, to take effect the first day of August, 1878, expediting the schedule and reducing the running time upon which the mail was required to be carried over said route from sixty-two hours, as provided in the contract aforesaid, to forty-three hours in summer and fifty hours in
2 winter, and allowing an additional sum therefor of eight thousand and five hundred dollars ($8,500) per annum.

That said order was made by the Postmaster-General by reason and in pursuance of certain requests and a petition presented to the said Postmaster-General praying for the expedition of the schedule upon said route to a forty-hour schedule, and representing that the business interests of the country along said route demanded said change; that said petition and requests were obtained by the defendant Voorhees, and his agents and employés acting for him, and were forwarded to the Postmaster-General by or at the solicitation of said defendant Voorhees.

That so much of the said order as allowed the defendant $8,500 additional pay per annum was made by the Postmaster-General upon the basis of a certain statement made and sworn to by the said defendant Voorhees on the 17th day of July, 1878, which said statement was presented to the Postmaster-General by or on behalf of said defendant Voorhees, and a copy of which is hereto annexed, marked Exhibit "B," and made a part hereof; and the said additional allowance made as aforesaid was thereafter from time to time paid to the said defendant by the plaintiff.

The plaintiff further says that from the beginning of the mail service on the route aforesaid under the contract aforesaid the mail was in fact carried over said route on a schedule of less than forty-three hours, and

was being so carried at the time said order was made by the Postmaster-General expediting the contract schedule, and continued to be so carried thereafter.

That defendant Voorhees was engaged in running a line of
3 stages over said route and carried the mail upon said stages, and defendant ran said stages upon a schedule of less than forty-three hours for his own convenience and advantage; that, by reason of the order of the Postmaster-General aforesaid expediting the contract schedule to forty-three hours in summer and fifty hours in winter as aforesaid, no additional stock and carriers were employed or used or rendered necessary on said route over and above the number actually employed and used by the defendant in performing the service under the original contract prior to said order; nor was the actual speed increased, but defendant continued to carry said mail upon an actual schedule of less than forty-three hours after the making of said order precisely as he had done before the making of said order.

Plaintiff says that the extra and additional allowance of $8,500 made as aforesaid was made by the Postmaster-General without authority of law and was paid to by the plaintiff and received by the defendant, Voorhees, in violation of section 3961 of the Revised Statutes of the United States.

Plaintiff further says that the whole amount so paid to the defendant from the treasury of the plaintiff was the sum of $14,342.52, which sum was paid from time to time between the first day of August, 1878, and the 9th day of July, 1881. Said payments are more fully and at length set forth in the statement hereto annexed, marked Exhibit "C," and made a part thereof.

Said Exhibit "C" also shows the amount which defendant was unlawfully entitled to receive upon the basis of the contract price and of the stock and carriers actually employed.

Wherefore plaintiff prays judgment for the sum of fourteen thousand three hundred and forty-two dollars and fifty-two cents, with interest at the rate of six per cent. per annum from the 9th day of July, A. D. 1881, together with the costs of this suit.

G. M. LAMBERTSON,
U. S. District Att'y.
GEORGE L. DOUGLAS,
Of Counsel.

4 UNITED STATES OF AMERICA,
District of Nebraska, ss:

Genio M. Lambertson, being first duly sworn, upon oath says he is the attorney of record in the above-entitled action; that the matters and facts set forth therein are true, as affiant verily believes.

GENIO M. LAMBERTSON.

Subscribed in my presence and sworn to before me this 13th day of July, A. D. 1886.

ELMER D. FRANK,
Clerk.

Attached to said amended petition are Exhibits "A," "B," & "C," in words and figures following, to wit:

No. 35040.] EXHIBIT A. [$17,000 per annum.

United States of America, Cheyenne, Laramie Co., Wyo.

This article of contract, made March 15th, eighteen hundred and seventy-eight, between the United States of America (acting in this behalf by their Postmaster-General) and Luke Voorhees and O. J. Salisbury, of Salt Lake City, Utah Territory, and J. T. Gilmer, of Salt Lake City, Utah Territory, as his sureties, witnesseth: That whereas Luke Voorhees has been accepted, according to law, as contractor for transporting the mail on route No. 35040, from Fargo, Dak., by Tevsil, Georgetown, Elm River, Carlton (U. S.), Caledonia, Frog Point (U. S.), Grand Forks, Turtle River, and Rose Point, to Pembina and back, six times a week, at seventeen thousand dollars per year, for and during the term beginning July first, eighteen hundred and seventy-eight, and ending June thirtieth, eighteen hundred and eighty-two. Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

5 1st. To carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail, whatever may be its size, weight, or increase, during the term of this contract and within the time fixed in the annexed schedule of departures and arrivals, and so to carry until said schedule is altered by the authority of the Postmaster-General of the United States as hereinafter provided, and then to carry according to such altered schedule, and in all cases to carry said mail in preference to passengers and freight and to their entire exclusion if its weight, bulk, or safety shall so require. And that they will carry the mail upon demand by any conveyance which said contractor regularly runs or is concerned in running on the route beyond the number of trips above specified in the same manner and subject to the same regulations as are herein provided touching regular trips.

2d. To carry the mail in a safe and secure manner, free from wet or other injury, under a sufficient oil-cloth or bear-skin if carried on a horse, and in a boot under the driver's seat if carried in a coach or other vehicle.

3d. To take the mail and every part thereof from and deliver it and every part thereof at each post-office on the route or that may hereafter be established on the route (or on any route that may hereafter be established and to which this contract may be extended as hereinafter provided), and into the post-office at each end of the route, and into the post-office, if one is there kept, at the place at which the carrier stops for the night, and if no post-office is there kept, to lock it up in some secure place at the risk of the contractor.

They also undertake, covenant, and agree with the United States of America, and do bind themselves jointly and severally as aforesaid,

6 to be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mails and his careful and faithful performance of the obligations assumed herein and those imposed by law, not to commit the care or transportation of the mail to any person under sixteen years of age; to discharge any carrier of said mail whenever required so to do by the Post-

master-General; not to transmit by themselves or either of them or either of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry otherwise than in the mail letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers which go by mail; to carry post-office blanks, mail locks and bags and other postal supplies, and also the special agents of the Department on the exhibition of their credentials, if a coach or other suitable conveyance is used, without additional charge; to collect quartely, if required by the Postmaster-General, of postmasters on the route the balances due from them to the United States on their quarterly returns, and faithfully to render an account thereof to the Postmaster-General in the settlement of the quarterly accounts of said contractor, and to pay over to the Auditor of the Treasury for the Post-Office Department on the order of the Postmaster-General all balances remaining in his hands.

For which services, when performed, the said Luke Voorhees, contractor, is to be paid by the United States the sum of seventeen thousand dollars a year, to wit: Quarterly, in the months of November, February, May, and August, through the postmasters on the route or otherwise at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General as hereinafter stipulated, or to be suspended in case of delinquency.

7 It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing a pro rata increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary; and in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and a pro rata compensation for the service rendered: Provided, however, that, in case of increased expedition, the contractor may, upon timely notice, relinquish the contract.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid, that they shall forfeit—

1. The pay of a trip when it is not run, and, in addition, if no sufficient excuse for the failure is furnished, an amount not more than three times the pay of the trip.

2. At least one-fourth of the pay of a trip when the running is so far behind time as to fail to make connection with a depending mail.

3. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail; or giving preference to passengers or freight over the mail, or any portion thereof, or for leaving the same for their accommodation; or carrying, otherwise than in the mail, matter which should go by mail; or transporting persons engaged in so doing, with knowledge thereof, a penalty equal to a quarter's pay.

4. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satis-

8 factory explanation of the delinquency in due time, to the Postmaster-General, a penalty in his discretion; that these forfeitures may

be increased into penalties of a higher amount, in the discretion of the Postmaster-General, according to the nature or frequency of the failure and the importance of the mail: Provided that, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster-General may annul the contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier when required by the Department; for transmitting commercial intelligence or matter which should go by mail, contrary to the stipulations herein; for transporting persons so engaged, as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed that such annulment shall not impair the right to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counter-claim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.

And it is hereby stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Post-
9 master-General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster-General.

And this contract shall, in all its parts, be subject to the terms and requirements of the act of Congress approved April twenty-first, one thousand eight hundred and eight, entitled "An act concerning public contracts," and of the act of Congress approved June eight, one thousand eight hundred and seventy-two, entitled "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department."

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed and has attested the same by his signature, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names respectively.

Signed, sealed, and delivered by the Postmaster-General in the presence of J. N. Dorris.

D. M. KEY, *Postmaster-General.*

And by the other parties hereto in the presence of—

H. A. IDDINGS,
M. WILLSIE,
Witnesses.

Signed this 29 day of March, 1878, LUKE VOORHEES, [SEAL.]
Contractor.

" 29 " " 1878, O. J. SALISBURG, [SEAL.]
" " 15 " April, 1878, JOHN T. GILMER, [SEAL.]
Sureties.

(Write the date you sign opposite each signature.)

POST-OFFICE,
Cheyenne, Wyo., April 18th, 1878.

I hereby certify that O. J. Salisbury, of Salt Lake City, Utah, and John T. Gilmer, of Salt Lake City, Utah, are good and sufficient sureties for the amount of the foregoing contract.

H. GLAFCKE,
Postmaster.

10 *The schedule of departures and arrivals.*

Leave Fargo daily, ex. Sun., at 4 a. m.
Arrive at Pembina third days by 6 p. m.
Leave " daily, ex. Sun., at 4 a. m.
Arrive at Fargo third days by 6 p. m.

Provided, that when more than seven minutes are taken for opening and closing the mails at any office the surplus time so taken is to be allowed in addition to the time fixed in this schedule.

Certificate of the oath of mail contractors and carriers.

[Required by act of Congress of June 8, 1872.]

I, Luke Voorhees, being "employed in the care, custody, and conveyance of the mail," as contractor on route No. 35040, from Fargo to Pembina, Territory of Dakota, do swear that I will faithfully perform all the duties required of me and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States, and that I will honestly and truly account for and pay over any moneys belonging to the said United States which may come into my possession or control; and I do further solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign or domestic, so help me God.

LUKE VOORHEES,
Contractor.

COUNTY OF LARAMIE,
Terr'y of Wyoming, ss:

Sworn before the subscriber, a notary public for the county and Territory aforesaid, this first day of April, A. D. 1878. And I also certify that the person above named is above the age of twenty-one years to the best of my knowledge and belief.

E. W. MANN.

Attached to said Exhibit "A" is the certificate of the Acting Postmaster-General, in words and figures following, to wit:

11 POST-OFFICE DEPARTMENT,
Washington, D. C., Nov. 22nd, 1884.

I certify that the annexed is a true copy taken from the files and records of this Department.

In testimony whereof, I have hereto set my hand, and caused the seal of the Post-Office Department to be affixed, the day and year above written.

[SEAL.] JNO. SCHUYLER CROSBY.
Acting Postmaster-General.

Exhibit "B".is in words and figures following, to wit:

35040. (Copy.)

I hereby certify that it will take fifty per cent. more men and horses to perform mail service on route 35040 from Fargo to Pembina, on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter.

(S'g'd.) LUKE VOORHEES.

Subscribed and sworn to before me this 17th day of July, A. D. 1878.

(S'g'd.) E. W. MANN,
Notary Public, Laramie Co., Wyoming.

POST-OFFICE DEPARTMENT,
Washington, D. C., August 1st, 1883.

I, A. D. Hazen, Acting Postmaster-General of the United States of America, certify that the annexed is a true copy of the original sworn statement on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post-Office Department to be affixed, at the city of Washington, the day and year above written.

[SEAL.] A. D. HAZEN,
Acting Postmaster-General.

12 Exhibit "B." 35040. (J. H. C.) G. F. S. Nov. 22, 1884.

Exhibit C is in words and figures following, to wit:

ROUTE NO. 35040.

[Fargo to Pembina, Dakota. Contract term July 1, 1878, to June 30, 1882. Contractor, Luke Voorhees. Service discontinued from July 31, 1881.]

Cost of service was as follows:

From July 1, 1878, to July 31, 1878, at	$17,000.00	p. a.....	$1,432.07
" Aug. 1, 1878, " Oct. 20, 1878, "	29,750.00	" ".....	6,548.23
" Oct. 21, 1878, " July 31, 1880, "	25,500.00	" ".....	45,387.23
" Aug. 1, 1880, " Nov. 14, 1880, "	25,662.94	" ".....	7,392.04
" Nov. 15, 1880, " July 31, 1881, "	25,744.41	" ".....	18,328.89

Additional allowance on service dispensed with:

By order of Oct. 11, 1878, 1 mo's pay at	$4,250.00	p. a....	354.17
By order of July 9, 1881, 1 " " "	17,162.94	" ".....	1,430.24
Total allowance for service			$80,872.87
The Auditor made the amount greater by			.01
			$80,872.88

Deductions were made as follows:

Quarter ended Dec. 31, 1879	$819.01
" " Mar. 31, 1880	686.76
" " June 30, 1880	300.80
" " Sept. 30, 1880	186.38
" " Dec. 31, 1880	274.00
" " Mar. 31, 1881	400.43
" " June 30, 1881	596.76
Period July 1 to 31, 1881	81.90
Total deductions	$3,346.04

Remission was as follows:

Quarter ended Mar. 31, 1880	686.76
Total deductions not remitted	$2,659.28

13 RECAPITULATION.

Total allowance for service	$80,872.88
Total deductions not remitted	2,659.28
Amount which would have been paid	$78,213.60
But by order of June 19, 1883, there was suspended from the contractor's pay	9,356.37
Amount actually paid for service	$68,857.23

Pay on the basis of stock and carriers actually employed would have been as follows:

From July 1, 1878, to July 31, 1878, at $17,000.00 p. a	$1,432.07
" Aug. 1, 1878, " Oct. 20, 1878, " 19,833.33 "	4,365.49
" Oct. 21, 1878, " July 31, 1880, " 17,000.00 "	30,258.15
" Aug. 1, 1880, " Nov. 14, 1880, " 17,108.63 "	4,928.03
" Nov. 15, 1880, " July 31, 1881, " 17,162.94 "	12,219.26

Additional allowance on service dispensed with, viz:

By order of Oct. 11, 1878, 1 mo's pay at $2,833.33 p. a.	236.11
By order of July 9, 1881, 1 " " " 17,162.94 "	1,430.24
Total allowance for service on new basis	$54,869.35

Deduction on the new basis would have been as follows:

Quarter ended Dec. 31, 1879	$190.12
" " Mar. 31, 1880	162.96
" " Mar. 31, 1881	54.84
" " June 30, 1881	95.97
Period July 1 to 31, 1881	13.71
Total deductions on new basis	$517.60

Remission on the new basis would have been:

Quarter ended Mar. 31, 1881	162.96
Total deductions less remission on the new basis	$354.64

14 RECAPITULATION.

Total allowance for service on new basis.....	$54, 869. 35
Total deductions, less remission, on new basis	354. 64
Amount which should have been paid on new basis.....	54, 514. 71

FINAL RECAPITULATION.

Amount actually paid for service..	$68, 857. 23
Amount which should have been paid.....	54, 514. 71
Amount to be recouped	14, 342. 52

Upon the back of said amended petition appear endorsements in words and figures following, to wit: No. 343. Doc. I. The United States vs. Luke Voorhees. Amended petition. Filed Jul. 13, 1886. Elmer D. Frank, clerk. G. M. Lambertson, George L. Douglas, att'ys for plaintiff.

Thereupon, afterwards, to wit, on the 29th day of October, 1886, demurrer to amended petition was filed in said case, which said demurrer is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LUKE VOORHEES, DEFENDANT. } Demurrer.

Now comes the defendant and demurs to the petition of the plaintiff filed herein, and for cause of demurrer saith that said petition does not set forth facts sufficient to constitute a cause of action in favor of the plaintiff as against this defendant.

JNO. L. WEBSTER,
Att'y for Def't.

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 343. I. U. S. circuit court, district of Nebraska. United States vs. Luke Voorhees. Demurrer to last amended petition. Filed Oct. 29, 1886. Elmer D. Frank, clerk.
15 John L. Webster, att'y for defendant.

Thereupon, afterwards, at the May term of said court, on the said 29th day of October, 1886, the following proceedings were had and done in said cause, as appears of record on folio 400, journal "L" of said court, to wit:

UNITED STATES
vs.
LUKE VOORHEES. } 343. I.

Now come the parties hereto, by their attorneys, and this cause is argued and submitted to the court on the demurrer to the amended petition herein, whereupon the court takes the same under consideration.

Thereupon, afterwards, to wit, on the 1st day of November, 1886, opinion of district judge was filed in said case, which said opinion is in words and figures following, to wit:

In the United States circuit court, district of Nebraska.

UNITED STATES
vs.
LUKE VOORHEES. } Opinion.

This cause was submitted to the court on a general demurrer to the petition. The petition sets forth the following facts:

1st. That in 1878 the defendant entered into a contract with the Postmaster-General to transport the mails from Fargo to Pembina, on route No. 35040, on a 62-hour schedule.

2nd. That afterwards, on July 30th, 1878, an order was made expediting the schedule, reducing the running time from 62 hours to 43 hours in summer and 50 hours in winter, and allowing $8,500 additional pay per annum.

16 3rd. That said order of expedition was made pursuant to a written request that the business interest of the country along the route demanded the expedition.

4th. That such petition and request was procured by defendant and his agents and by defendant forwarded to Postmaster-General.

5th. That so much of the order as allowed the extra pay of $8,500 per annum was made upon the basis of a sworn statement by the defendant that it would require 50 per cent. more men and horses to perform said service on a reduced schedule from 62 hours to 43 hours in summer and 50 hours in winter.

6th. That as a matter of fact the defendant had been, and was at the time said order of expedition was made, carrying said mails on a schedule time of less than 43 hours.

7th. That no extra men or horses were required after the order of expedition more than were actually used by the defendant before and at the time the order of expedition was made.

The defendant was not required under his original contract to carry the mails faster than a 62-hour schedule. If he chose to do so of his own accord for the accommodation of the business interest of the country he was at liberty at any time to reduce the speed to a 62-hour schedule. There was no wrong on his part, therefore, in causing to be circulated and presented to the Postmaster-General a petition requesting an expedition of the schedule time.

The order allowing the extra compensation of $8,500 per annum was but paying the defendant for the rapid or extra service he was performing.

The fact that the defendant did not need or use any more men and horses after the order of expedition than he was actually using before the order of expedition does not change the case. It does not appear

17 what number of men and horses he would have used if he had only carried the mail on a 62-hour schedule. Hence, it can not

be determined that he was not using 50 per cent. more men and horses on a 43-hour schedule than he would have used on a 62-hour schedule. The defendant was not required to use the number of men and horses set forth in his sworn certificate; the true inquiry should be not what number of men and horses were actually used, but what number of men and horses a reasonably prudent man would use to carry the mail on the expedited schedule. One man might, by extra or overwork of men and horses, perform the services with less men and less horses than would another man.

If the defendant saw fit to get extra work out of his men and horses the Government can not complain; the Government can only be concerned in knowing what number of men and horses would reasonably be required by a prudent man (having due regard to the usual number of hours men work and the usual number of miles at a specified speed horses will travel per day) to perform the service on the expedited schedule.

No fraud is charged upon the defendant. There can be no recovery from the defendant of the extra pay allowed him unless he has been guilty of some fraud upon the Government. From the facts set forth in the petition it appears to me the defendant did no more than he had a perfect right to do. The Postmaster-General may not have known that the defendant was carrying the mail on less than a 43-hour schedule when the order of expedition was made, but the Postmaster-General had the full means of information on this subject from the records in his Department.

There was no such fraud practiced by the defendant as would justify a recovery in this case, and the demurrer will be sustained and the suit dismissed.

ELMER S. DUNDY, *Judge.*

18 Upon the back of said opinion appear endorsements in words and figures following, to wit: No. 343. I. The United States *vs.* Luke Voorhees. Opinion of district judge. Filed Nov. 1, 1886. E. D. Frank, clerk..

Thereupon, afterwards, at the November term of said court, on the 1st day of November, 1886, the following proceedings were had and done in said cause, as appears of record on folio 404, journal "L," of said court, to wit:

UNITED STATES
vs.
LUKE VOORHEES. } 343. I.

This cause came to be heard on the demurrer of the defendant to the last amended petition of the plaintiff herein, and the same was argued by the attorneys for the respective parties, and the court being fully advised in the premises, it is ordered and adjudged by the court that the said demurrer be, and the same is hereby, sustained. And, the plaintiff electing to stand on said petition, it is further ordered and adjudged that this cause be, and the same is hereby, dismissed. To which order and judgment of the court the plaintiff excepts.

Thereupon, afterwards, to wit, on the 7th day of December, 1886, a writ

of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals:

19 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the United States of America, plaintiff, and Luke Voorhees, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, shall de done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United states, at Omaha, in said district, this 7th day of December, 1886.

[SEAL.] E. D. FRANK,
Clerk.

Allowed by
ELMER S. DUNDY,
Judge.

(Indorsed:) No. 343, I. United States circuit court, district of Nebraska. United States vs. Luke Voorhees. Writ of error. Filed Dec. 7, 1886. Elmer D. Frank, clerk.

20 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To LUKE VORHEES, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Omaha, this 7th day of December, 1886.

[SEAL.] ELMER S. DUNDY,
Judge.

Service hereof accepted, Dec. 7, 1886.

JNO. L. WEBSTER,
Att'y for Luke Voorhees.

(Indorsed:) No. 343, I. United States circuit court, district of Nebraska. United States vs. Luke Vorhees. Citation. Filed Dec. 7, 1886. Elmer D. Frank, clerk.

21 UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the foregoing writ of error, and obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 20, contain true and faithful transcripts of the amended petition, demurrer, orders of court, and opinion of record and on file in my office as said clerk, in the case of the United States vs. Luke Voorhees, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Omaha, this 27th day of December, A. D. 1886.

[SEAL.] E. D. FRANK,
Clerk.

(Indorsment on cover:) No. 282. The United States, plaintiff in error, vs. Luke Voorhees. Nebraska C. C. U. S. Filed Jannary 4, 1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, PLAINTIFF in error,
vs.
LUKE VOORHEES.
} No. 282.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, PLAINTIFF in error,
vs.
LUKE VOORHEES. } No. 282.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This action was brought by the United States to recover $14,342.52, with interest, from the defendant, under the following circumstances:

On March 15, 1878, the defendant, Voorhees, contracted with the United States, through the Postmaster-General, to carry the mails from

Fargo to Pembina, in Dakota, and back, six times a week, at $17,000 a year, for the term beginning July 1, 1878, and ending June 30, 1882. (R., pp. 3–5.)

On July 30, 1878, an order was made by the Postmaster-General, to take effect on August 1, 1878, expediting the schedule and reducing the running time upon which the mail was required to be carried over said route from sixty-two hours, as provided in the contract, to forty-three hours in summer, and fifty hours in winter, and allowing an additional sum of $8,500 per annum for this expedition and reduction of the running time.

This order of the Postmaster-General was made in obedience to requests and representations that the business interests of the country along the route demanded the change, and the petition alleges that these requests and representations were the results of the efforts of the defendant, Voorhees, and his agents (R., p. 1).

The petition also states, that the order allowing the additional $8,500 was made by the Postmaster-General upon the basis of a sworn state-

ment of the defendant, Voorhees, whereby he informed the Postmaster-General that it *would take 50 per cent. more men and horses* to perform mail service on the route from Fargo to Pembina on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty in winter. (Rec., p. 7.)

The petition states that at the time the order for expediting the schedule was made the defendant was, and had been from the date the contract went into operation, carrying the mail over the route in question on a schedule of less than forty-three hours. The defendant ran a line of stages over the route for his own advantage and the mail was carried in those vehicles.

The petition states that no stock and carriers were used by defendant in performing the alleged expedited service, over and above what he had been theretofore employing under the contract.

The petition avers that the extra allowance of $8,500 was made without authority of law and was paid to Voorhees and received by him in violation of section 3961, Revised Statutes of the United States, and that the total amount thus

illegally paid to and received by defendant was $14,342.52, for which sum, with interest at the rate of 6 per cent. per annum, this action is brought.

The defendant demurred to the petition. (R., p. 9.)

On November 1, 1886, the demurrer was sustained and the petition dismissed. (R., p. 11.)

ASSIGNMENT OF ERROR.

The judgment is erroneous in this, that the demurrer should have been overruled and judgment entered for the plaintiff.

ARGUMENT.

The grounds on which the learned judge below sustained the demurrer appear by his opinion in the record (pp. 10, 11).

These grounds are entirely opposed to the views of this court, as expressed by Mr. Justice Field, in *United States* v. *Barlow* (132 U. S., 271).

According to those views it is apparent that, looking at the statement of the case in the petition, the defendant was guilty of a violation of

section 3961, Revised Statutes, which is in the following words:

> *No extra allowance shall be made for any increase of expedition* in carrying the mail *unless thereby the employment of additional stock and carriers is made necessary*, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution.

It is equally apparent that this action was maintainable under section 4057, Revised Statutes, which is as follows:

> In all cases where money has been paid out of the funds of the Post-Office Department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon.

Indeed, as this court shows in the case referred to, this suit is maintainable on the principles that underlie the ordinary common law action of assumpsit for money had and received.

It is respectfully submitted that the judgment should be reversed.

WM. A. MAURY,
Assistant Attorney-General.

Office Supreme Court U. S.
FILED
APR 7 1890
JAMES H. MCKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES,
Plaintiff in Error,
vs.
LUKE VOORHEES,
Defendant in Error.

October Term, 1889.

No. 282.

Brief for Defendant in Error.

JNO. L. WEBSTER, *Attorney for Defendant.*

IN THE SUPREME COURT
OF THE UNITED STATES.

THE UNITED STATES,
Plaintiff in Error,
vs.
LUKE VOORHEES,
Defendant in Error.

October Term, 1889.
No. 282.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

The questions presented in this case arise on a general demurrer to the petition. The trial court sutained the demurrer. The United States excepted to the ruling, and sued out a writ of error.

The facts stated in the petition are:

First.—That in 1878 LUKE VOORHEES entered into a contract with the POSTMASTER-GENERAL to transfer the mails of the United States from Fargo to Pembina, in the Territory of Dakota, and back, (Route No. 35040) on a 62-hour schedule, six times a week for $17,000 per year.

Second.—That afterwards, on July 30, 1878, the POSTMASTER-GENERAL made an order to take effect Aug. 1, 1878, expediting the schedule and reducing the running time from 62 hours, as provided for in the contract, to 43 hours in summer and 50 hours in winter, and allowing an additional pay therefor of $8,500 per year.

Third.—That the above mentioned order was made by reason, and in pursuance of a written request presented to the POSTMASTER-GENERAL, praying such expediting of the schedule, and representing that the business interests of the country, along the route, demanded said change.

Fourth.—That said petition and requests were obtained by LUKE VOORHEES and his agents, and were by him, or at his solicitation, forwarded to the POSTMASTER-GENERAL.

Fifth.—That so much of said order as allowed $8,500 additional pay per annum, was made by the POSTMASTER-GENERAL upon the basis of a certain statement made and sworn to by LUKE VOORHEES, as follows, to-wit:

Exhibit "B," p. 7, Record.

"I hereby certify that it will take fifty per cent. more "men and horses to perform mail service on Route 35,040, "from Fargo to Pembina, on a reduced schedule from six-"ty-two hours to forty-three hours in summer and fifty "hours in winter.

"(Signed) LUKE VOORHEES.

"Subscribed in my presence and sworn to before me "this 17th day of July, A. D. 1878.

"(Signed) E. W. MANN.

"Notary Public, Laramie Co., Wyoming."

Sixth.—That from the beginning of the service the

mail was in fact carried over said route on a schedule of less than 43 hours, and was so being carried when the order expediting and reducing the schedule was made, and continued to be so carried thereafter.

Seventh.—That LUKE VOORHEES continued to run a line of stage coaches over said route, and carried the mail thereon, and ran said stages on a schedule of less than 43 hours for his own convenience and advantage.

Eighth.—That by reason of the order expediting the schedule to 43 hours in summer and 50 hours in winter no additional stock and carriers were employed, or used or rendered necessary, over and above the number actually employed and used by LUKE VOORHEES in performing the service prior to said order.

Ninth.—That LUKE VOORHEES continued to carry the mail on a schedule of less than 43 hours after the making of said order, as he had done prior thereto.

Tenth.—That said order of the POSTMASTER-GENERAL, allowing $8,500 additional pay per annum was without authority of law, and the money was paid to and received by LUKE VOORHEES in violation of Section 3961.

Eleventh.—That the amount so paid LUKE VOORHEES was $14,342.52, for which United States prays judgment, with interest from July 9, 1881.

BRIEF.

The statutes upon which the United States must rely to maintain this action are Sections 3961 and 4057.

SEC. 3961. "No extra allowance shall be made for any

increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

SEC. 4057. "In all cases where money has been paid out of the funds of the Post-Office Department, under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by mistake, collusion or misconduct of any officer or other employe in the postal service, the POSTMASTER-GENERAL shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

It stands admited that the amount of additional compensation, allowed by the order, to-wit, $8,500 per annum was not excessive under Section 3961, if such expedited service would require 50 per cent. more men and horses than were required to perform the service under the original contract.

THE CERTIFICATE NOT FALSE.—It is not alleged that the statement in the certificate of LUKE VOORHEES was false. From all that appears it did require 50 per cent. more men and horses to carry the mail on a schedule of 43 hours in summer and 50 hours in winter than would have been necessary to perform that service on a 62-hour schedule.

The fact that LUKE VOORHEES may have, therefore, carried the mail on a schedule of less than 43 hours is immaterial. By his contract with the United States he was only required to carry the mail on a 62-hour schedule. If he saw fit to carry the mail on less than a 62-hour schedule, he was doing what he was not required to do under his contract. The Government was getting the benefit of a rapid service without adequate compensation.

The certificate of LUKE VOORHEES is not a certificate that it would require 50 per cent. more men and horses to carry the mail on a schedule of 43 hours, than he was then actually using in the service. If he was then carrying the mail on a schedule of 43 hours or less, he must, necessarily have been using more men and horses than he would have been required to use, if he had not exceeded the rate of speed required in his contract with the Government.

If he was using no more men and horses, under the order expediting the schedule, than he was using before, it was by reason of the fact that he had theretofore been carrying the mail at a more rapid rate of speed than he was required to do. From all the facts stated in the petition, it is reasonable to conclude that it would have required 50 per cent. less men and horses to have carried the mail on a 62-hour schedule,—as required by the contract,—than he was actually using.

NO INTENT TO DECEIVE BY THE CERTIFICATE.—The petition does not allege that the POSTMASTER-GENERAL or any other officer of the Government, was ignorant of the true conditions of affairs at the time of the making of the order

expiditing the route. From all that appears in the petition, the officers and agents of the Government were in possession of all the facts, and the order was made with a full knowledge of all the facts.

It is the duty of the POSTMASTER-GENERAL to furnish postmasters' schedules of the time of arrival and departure of mail at their several offices, and to cause to be kept and returned to the Department by the postmasters, at short and regular intervals, registers showing the exact time of the arrival and departure of the mail. (Revised Stat. sec. 3841.)

A division of inspectors is to examine these registers, also certificates of route agents, and reports of mail failures, and to note contractor delinquents. (Regulations 1873, 148.)

It is a well known fact that there is lodged in the Postoffice Department a complete record of the arrival and departure of every mail over a post route, and as this was, and that the Postoffice Department had lodged therein official records showing the fact, that prior to the making of the order expediting the schedule LUKE VOORHEES was carrying the mail over this route, and on a schedule of less than 62 hours.

There is no averment in the petition that such record was not there, and there is no averment that the POSTMASTER-GENERAL was not familiar with that record.

LUKE VOORHEES must have been supposed to have understood the regulations of the Postoffice Department and the manner of transacting its business. He must have known that the Postoffice Department was in possession of

the records, showing the time when each mail that he carried left one end of the route and was received at the other, and that thereby the Postoffice Department had full knowledge of the fact that he was carrying the mail on less than a 62-hour schedule, as required by his contract.

This being so, it cannot be supposed that LUKE VOORHEES intended to conceal from the POSTMASTER-GENERAL the fact that he was engaged in carrying the mail on less than a 62-hour schedule. This does away with any presumption of an intent on the part of LUKE VOORHEES to mislead or deceive the Postoffice Department. The conclusion must be that LUKE VOORHEES made this statement, supposing and believing that the POSTMASTER-GENERAL was possessed of full knowledge of the then existing condition of affairs.

The attorney for the Government, who drafted the petition, understood this fact, as it is not averred that there was an intent to deceive on the part of LUKE VOORHEES, nor is it averred that anybody was deceived by the statement, or that there was any fraud or mistake of fact in connection with it. This is the distinguishing feature between this case and the case of United States vs. Barlow, 132 U. S., 271. In that case it was charged that the money was paid under a ***mistake of fact***, caused by ***false representations*** as to the services. There Sanderson testified that no additional men and horses were necessary to perform the services on the expedited schedule.

EXTRA COMPENSATION WAS PROPER.—If the amount of the compensation, fixed in the original contract, for carry-

ing the mail on a 62-hour schedule, was a proper compensation, (and it is admitted that it was), and if it required fifty per cent more men and horses on a 43-hour schedule in summer and a 50-hour schedule in winter, than would have been required on a 62-hour schedule, then an extra compensation for the increased speed was a proper compensation, independent of the fact, as to whether or no LUKE VOORHEES had formerly carried the mail at such rapid rate of speed.

NUMBER MEN AND HORSES NECESSARY ON A 62-HOUR SCHEDULE, IS THE CRITERION—NOT NUMBER ACTUALLY USED.—Section 3961 does not require that the increased compensation shall be based upon the fact, that more men and horses shall be required to carry the mail on the expedited schedule than may have been *used* formerly by the contractor. The section properly construed, simply provides that the additional compensation shall be in proportion to the additional stock and carriers, made necessary to carry the mail on a reduced schedule, over and above the stock and carriers necessary to carry the mail on the schedule of the *original contract*. In other words—If it required fifty per cent. more men and horses to carry the mail on a 43-hour schedule in summer, and a 50-hour schedule in winter, than were required to carry the mail over the same route on a 62-hour schedule, then the additional compensation was right and proper.

This part of the section is: "The additional compensation shall bear no greater proportion to the additional stock and carriers, necessarily employed, than the compen-

sation in the ORIGINAL CONTRACT bears to the stock and carriers necessarily employed in its execution."

The terms of this section have reference only to the proportionate amount of stock and carriers to be used under the *two respective contracts*, and do not have reference to what may have been the number of men and horses employed in the service, irrespective of the contract.

UNITED STATES CANNOT BASE CLAIM ON FACT VOORHEES HAD CARRIED MAIL ON LESS THAN 62-HOUR SCHEDULE.—Under the original contract, LUKE VOORHEES was not required to carry the mail on a schedule of less than 62 hours. He was at liberty to abandon that rapid speed at any time he chose. The Government had no right to ask him to continue that rapid speed under the original contract. His action, therefore, being a voluntary one—subject to abandonment at any time—he was at liberty to contract with the Government for compensation, for a rapid rate of speed. The Government, likewise, through its officers, was at liberty to contract with him for the rapid rate of speed, and to make adequate compensation therefor.

NUMBER MEN AND HORSES A REASONABLY PRUDENT MAN WOULD USE.—In considering section 3961, it is not necessary that the 50 per cent more men and horses shall be actually used. The inquiry shall be as to the number of men and horses which a reasonably prudent man would use in the performance of such service. One contractor may drive his horses thirty miles a day, while another might drive the same horses but twenty miles per day. One contractor might, by the payment of extra compensation, have his men work extra hours

per day—and thus use a less number of men than another contractor would use for the same service.

If the contractor seeks to economize as to the purchase of horses, by driving them an extra distance, he may assume the burden of having the horses sooner worn out and buying new ones to replace them, but if so, this is a question with which the Government has nothing to do. If he should have his men work twelve hours per day, instead of eight, this is a question with which the Government has nothing to do. The Government is dealing with contractors on some uniform system of labor and service.

It does not appear from the petition but what LUKE VOORHEES was getting a greater service, both from his men and horses, than a reasonably prudent contractor would have obtained in like service.

FACTS IN PETITION CONSISTENT WITH HONEST AND FAIR DEALING.—If the petition alleged that the statement in the certificate was false, or if it had alleged that it did not require 50 per cent more men and horses to carry the mail on a 43-hour schedule in summer and a 50-hour schedule in winter, than were required to carry the mail on a 62-hour schedule, then a different case would be presented. All the facts charged in the petition are perfectly consistent with honesty and fair dealing.

In Griffith vs. United States, 22 Ct. of Claims, 193, DAVIS, J., said:

"The Postmaster-General decides, first, whether expedition is necessary, and if this be settled in the affirmative, then, second, whether thereby additional stock and carriers are rendered necessary; and if they are, third, the num-

ber of stock and carriers now necessarily employed in the existing service; and fourth, the number of stock and carriers necessarily to be employed in the expedited service. It will be noticed that any decision on these questions involves largely mere estimates or opinions. The stock and carriers actually employed may not be the number necessarily employed in the mail service, a portion, perhaps being used for freight, passenger, or express business, while a determination of the number to be employed in the future is purely a question of estimate, calling for the good judgment of an expert.

"The power of ascertaining these facts and making these estimates is exclusively vested in the POSTMASTER-GENERAL. The decision is the result of his judgment and discretion."

DAVIS, J., further said (*supra*, p. 194 and 195):

"The action of the Postmaster-General was, in its nature, one of opinion and estimate, deduced from all the information which his department could procure. Whatever representations were made to him by the contractor were of the same nature. The number of horses and men necessary in the future to carry a mail over a given route, where passengers and freight are carried by the same conveyance, can be but an estimate, which may or may not stand the test of experience. It is apparent from the subject matter of this case that whatever was stated must have been understood by the party to whom it was addressed, as an expression of strong belief only, because it is a subject matter of which knowledge in the strict sense cannot be had. (Page vs. Bent, 43 Mass. 374.)

" 'From the nature of the subject matter, in relation to which the certificate was given, the estimate of value was nothing more than a conjectural opinion, which, whether true or false, constituted no legal cause of complaint.' (Gordon vs. Butler, 105 U. S. R., 558.)"